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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1430

J. BARANELLO & SONS,

Petitioner,

vs.

CITY OF PATERSON,

Respondent.

INDEPENDENT ELECTRICAL CO., INC.,

Cross-Petitioner,

vs.

CITY OF PATERSON,

Respondent.

CROSS-PETITION FOR CERTIORARI ON WRIT OF
CERTIORARI TO THE SUPREME COURT
OF NEW JERSEY

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Questions Presented for Review

1. Did the New Jersey Courts err in holding that an arbitration panel deciding commercial disputes must disclose in detail the basis of its award so as to establish to the satisfaction of a reviewing court that the arbitrators followed all of the technical rules of evidence and/or interpretation?
2. Did the New Jersey Courts err in holding that a *possibly* erroneous ruling on the admissibility of certain evidence which *may* have affected the arbitration award required its vacation?
3. Did the New Jersey Courts err in holding that an arbitration award is to be vacated upon a finding by the reviewing court that the arbitrators *may* have interpreted relevant contract provisions differently from the reviewing court's interpretation?

Parties to the Proceedings Below

The parties below include the City of Paterson, New Jersey, Petitioner J. Baranello & Sons (a New York partnership), Cross-Petitioner Consolidated Precast, Inc., (a Connecticut corporation) and the following New Jersey corporations: Cross-Petitioner Independent Electrical Co., Inc.; Davidson & Howard Plumbing & Heating, Inc.; and The Conditioning Co., Inc. Each of the aforesaid contractors arbitrated their claims against the City of Paterson in a consolidated arbitration proceeding, sought confirmation of the award in the State court by consolidated actions, responded to the City's appeal and filed consolidated unsuccessful Petitions for Certification to the New Jersey Supreme Court.

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Official and Unofficial Reports of Opinions of the Courts Below

The opinions involved in the within action have, to date, not been reported in either the official or unofficial reporting system.

Grounds for Jurisdiction

The judgment to be reviewed was issued by the Supreme Court of New Jersey under date of November 21, 1983, and was entered on November 28, 1983.

The statutory provisions which confer jurisdiction upon this Court are 28 U.S.C. §1257(3) and 9 U.S.C. §§1-14.

The within Cross-Petition arises out of the same action involved in the Petition for Writ of Certiorari filed by J. Baranello & Sons under Docket No. 83-1430, received by Cross-Petitioner Independent Electric Co., Inc. on March 21, 1984 and the Cross-Petition of Consolidated Precast, Inc., received by Cross-Petitioner Independent Electric Co., Inc. on March 29, 1984.

The Statute at Issue

The pertinent sections of the Arbitration Act, 9 U.S.C. §§1-14 are set forth in the appendix of the Cross-Petition of Consolidated Precast, Inc. (A23 to A26).

Statement of the Case

In April 1977 cross-petitioner Independent Electric Co., Inc. ("Independent"), a New Jersey corporation, entered into a contract with respondent City of Paterson, New

Jersey, for the performance of electrical work on a multi-prime project for the City of Paterson. The other prime contractors were petitioner J. Baranello & Sons, a New York partnership, Cross-Petitioner Consolidated Precast, Inc., a Connecticut corporation, Davidson & Howard Plumbing & Heating, Inc., a New Jersey corporation, and The Conditioning Co., Inc., a New Jersey corporation. The various prime contracts included the standard form "A.I.A. Document A201, General Conditions of the Contract for Construction" issued by the American Institute of Architects (the "General Conditions"). (Relevant portions of the General Conditions are set forth in the Appendix to the Cross-Petition of Consolidated Precast, Inc. (at A27 to A32)).*

Article 7.10 of the General Conditions (A29) provides that "[A]ll claims, disputes and other matters in question arising out of, or relating to, this contract, or the breach thereof . . . shall be decided by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association . . ." The article goes on to provide that "the award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Work on the project was to commence in May, 1977. The project was delayed virtually from its inception. Disputes arose between Independent and the City of Paterson regarding the aforesaid delays as well as other matters, including Independent's right to payment of its retainage and resolution of change orders. Similar disputes arose between the City of Paterson and the other contractors.

* All appendix references herein are to the Appendix of the Cross-Petitioner Consolidated Precast, Inc.

The aforesaid project disputes resulted in the commencement of an arbitration between the City of Paterson and the various contractors.

The arbitration was heard by a panel of arbitrators in 23 full-day sessions between September, 1980 and May 27, 1981. During the arbitration, all of the contractors presented their respective claims against the City for retainage, delay damages and additional compensation for unresolved change orders. The City of Paterson, in turn, presented its claims against each of the contractors.

Throughout the course of the arbitration hearings, the arbitrators permitted all parties to present whatever proofs they wished to present. For example, the arbitrators at a hearing held on December 17, 1980 denied the application of the City to preclude evidence from being submitted by the contractors which would relate to delay claims arising before December 1977, the time when the City contended the requisite written notices of claim were given. The City of Paterson's motion was premised upon Article 8.3.2 of the General Conditions (A30) which required that all claims *for time extensions* (not monetary compensation) be made in writing in the architect no more than 20 days after the occurrence of the delay. By the time of the City of Paterson's motion, evidence had already been submitted by the contractors regarding written notification of delay and requests for extension of time as early as June, 1977, and the arbitrators had received in evidence minutes of job meetings from June, 1977 which contained statements that the progress of the entire project was being delayed.

On October 19, 1981, the arbitrators issued a unanimous award which encompassed all of the claims presented (A18). The award provided for the following relief with respect to the claims between Independent and the City of Paterson:

CITY OF PATERSON shall pay to INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC. the sum of FOUR HUNDRED EIGHTY-TWO THOUSAND NINE HUNDRED FIFTY DOLLARS (\$482,950.00), which sum includes all retainage due under the contract between the Parties, plus the amount resulting from delays and unresolved changes, where applicable less any liquidated damages assessed against the contractor.

The award decided the claims between the other contractors and the City of Paterson in a similar fashion. The respective plaintiffs filed separate actions in the Superior Court of New Jersey, Law Division, for a judgment confirming the award and each contractor sought prejudgment interest. After consolidating these actions, the Court on November 13, 1981 confirmed the awards and awarded prejudgment interest from the date of the award (A14). The Court found that the City had failed to establish any grounds for vacating or modifying the award.

The City appealed the judgment confirming the award. The Appellate Division reversed the trial-court judgment, vacated the award and remanded the matter "for a new [or supplemental] arbitration proceeding." (A2).

The ruling of the Appellate Division was based on its interpretation that Articles 12.1.6, 12.1.7 and 12.2.1 of the General Conditions (A29 to A30) required that written notice of certain type claims be given to the architect within 20 days of various triggering events. The Appellate Division held that the contract precluded recovery of damages occurring more than 20 days prior to said notification (A10). Since the arbitrators had failed to limit the contractors' proofs on the issue of delay damages to 20 days prior to written notification of claims under the cited contract provisions, the Appellate Court *assumed*

that the arbitrators awarded delay compensation for the alleged non-compensable period beyond the 20-day period. Based on said assumption, the Appellate Division concluded that the entire award must be vacated (A10 to A11).

The Appellate Division relied upon sections of the General Conditions different from those relied upon by the City of Paterson in its motion to preclude evidence. The City of Paterson had relied on Article 8.3.2 (A30), the time provision. It was amply demonstrated that these written notices of delays were given from the start of delays by Independent through the job meetings and by formal letters. Also, the City admitted that it had actual knowledge of the obvious delays from their inception. The Appellate Division found that, under its interpretation of the contract, actual knowledge of the delays and of claims was meaningless absent written notification (A9 to A10).

Finally, the Appellate Division inexplicably ignored the controlling provision of the contract, Article 7.4.1 of the General Conditions (A29), which reads as follows:

Should either party to the contract suffer injury or damage to person or property because of any act or omission of the other party or any of his employees, agents or others for whose acts he is legally liable, claims shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

Each of the contractors filed Petitions for Certification with the Supreme Court of New Jersey for review of the judgment of the Appellate Division. These Petitions were denied by Order dated November 21, 1983, and entered on November 28, 1983 (A1).

The Federal Question Presented.

The questions presented by this case concern the permissible scope of judicial review of an arbitration award governed by the Federal Arbitration Act, 9 U.S.C. §§1-14, and whether a reviewing court can vacate an arbitration award due to the court's uncertainty as to whether the arbitrators, in the view of the court, correctly interpreted the contract or properly ruled on evidence questions, and can a reviewing court vacate an award based upon the *mere possibility* that the arbitrators entered an award contrary to the court's own view of the issues.

The effect of the Federal Arbitration Act was not raised as an issue before the Law Division of the Superior Court of New Jersey or before the Appellate Division of the Superior Court. Argument before the Appellate Division was held in November, 1982, prior to the February, 1983 decision of this Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, — U.S. —, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983), which clearly stated the applicability of the Federal Arbitration Act to state court proceedings involving disputes of the type herein involved. The conflict of the Appellate Division judgment with the Federal Arbitration Act was raised by the Petitioner Baranello and the Cross-Petitioner Consolidated Precast in their Petitions for Certification, but the Supreme Court of New Jersey denied, without opinion, the Petitions of all the contractors (A1).

ARGUMENT

Cross-Petitioner Independent is seeking to confirm an arbitration award rendered against a political subdivision of the State of New Jersey. Save for the fact that Independent is a New Jersey corporation, the posture of Inde-

pendent in this case is identical to the position of the Petitioner and the Cross-Petitioner Consolidated Precast and the same relief is sought.

Although Independent is incorporated in New Jersey, the situs of the construction project, its contract on the subject project was clearly a "transaction involving commerce" within the meaning of 9 U.S.C. §1. Two of the prime contractors, Petitioner Baranello and Cross-Petitioner Consolidated Precast, maintained their offices outside of New Jersey. The work of Independent was intertwined with and had an impact upon that of both Baranello and Consolidated Precast, as well as the work of the other prime contractors. *Perforce*, Independent's work had an impact on interstate commerce, at least to the extent of its involvement with the work of Baranello and Consolidated Precast. The interrelationship of the various prime contracts was implicitly acknowledged by virtue of the consolidated proceedings in the arbitration and state court. Not only did the project involve two out-of-state contractors, but the project architect, John Ciccone, was located in Philadelphia, Pennsylvania as was the City's consulting engineer, Paul H. Yeoman's, Inc. The out-of-state presence of certain contractors and owner representatives generated a considerable amount of interstate communication, written and telephonic. The project having had an impact on interstate commerce, Independent, as a contractor on said project, should be able to avail itself of the Federal Arbitration Act.

If this Court were inclined to hold that the Federal Arbitration Act was applicable to the arbitration of the claims of Baranello and Consolidated Precast, but not the claims of Independent or the other contractors, the result would be chaos. In a consolidated arbitration, such as in this case, which involved some out-of-state contractors, the arbitrators would have differing obligations with re-

spect to the claims of the out-of-state contractors. Upon issuance of the award in such consolidated proceedings, the sufficiency of the award as to the out-of-state contractors would be evaluated by application of a differing standard, the federal standard, than that applied to the other contractors, the state standard application of differing standards to parties in a single arbitration proceeding could result in the award to the out-of-state contractors being confirmed and the award to the in-state contractors being vacated. In the re-arbitration of the in-state contractors claims, the owner might be confronted with a finding that the out-of-state contractors, whose awards had been confirmed and were thus not parties to the re-arbitration, were liable to the owner for the owner's enhanced liability to the in-state contractors in the second arbitration, but the owner would have no recourse against said out-of-state contractors for indemnification.

For example, assume a multi-prime construction project results in claims being asserted by various primes, save for the prime contractor for general construction, against the project owner predicated upon delays for which the owner claims the contractor for general construction is responsible. All of the primes are out-of-state contractors except for the contractor for general construction and the project, itself, is a local project having no impact on interstate commerce save for the general contractors' participation. The claims are arbitrated in a consolidated arbitration and the owner is found liable for half the amount of the claims of each of the claimant contractors and the contractor for general construction is, in turn, found liable to the owner in the full amount of the owner's liability to the other contractors. Application is made to the same state court judge by the successful contractors and the owner to confirm the award. The award to the out-of-state contractors against the

owner is confirmed under the Federal Arbitration Act, but the award in favor of the owner is vacated under state law which conflicts with the Federal Arbitration Act, so as to require the owner to commence further arbitration proceedings. Said further proceedings result in the contractor being relieved of any liability to the owner on the ground that the contractors, who have the confirmed award, did not comply with the notice provisions of the contract and, therefore, the owner could not properly be liable to them and *perforce* could not have a viable claim for indemnification against the prime contractor for general construction.

In the posited hypothetical the owner has been the victim of inconsistent results generated by the application of differing criteria, federal and state, to the same award. In order to avoid such an occurrence, the applicable rule of law should be, as Independent Electric suggests, that, if the *construction project* has an impact on commerce, *all* arbitrable claims *arising out of said project* are encompassed by the Federal Arbitration Act.

Independent's legal position is thus identical in all material respects to that of Baranello and Consolidated Precast and, therefore, relies upon the cogent arguments previously advanced by both Baranello and Consolidated Precast and respectfully refers the Court to their respective Petition and Cross-Petition.

CONCLUSION

Based upon the foregoing and upon the reasoning set forth in the Petition for Certiorari filed by J. Baranello & Sons under Docket No. 83-1430 and the Cross-Petition of Consolidated Precast, Inc., it is submitted that this Court should grant the Cross-Petition of Independent Electrical Construction Co., Inc.

Dated: Newark, New Jersey
April 2, 1984

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